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2 *NOT FOR PUBLICATION*
3

4 **UNITED STATES DISTRICT COURT**

5 **NORTHERN DISTRICT OF CALIFORNIA**

6
7 **WILLIAM DAVID BUSH,**

8 Plaintiff,

9 v.

10 **ROCHELLE WALENSKY, ET AL.,**

11 Defendants.

Case No. 4:21-cv-05825-YGR

**ORDER ADOPTING MAGISTRATE JUDGE'S
REPORT AND RECOMMENDATION; ORDER
DISMISSING CASE WITH PREJUDICE**

Re: Dkt. Nos. 6, 9

12
13 The Court has reviewed Magistrate Judge Joseph Spero's Report and Recommendation
14 (Dkt. No. 6, Report and Recommendation, "Report") recommending dismissal of this case with
15 prejudice because it fails to state a claim upon which relief can be granted pursuant to 28 U.S.C.
16 section 1915(e). Plaintiff objected to the Report. (Dkt. No. 9.) The Court has reviewed the
17 Report and objection carefully and issues the following decision:

18 Magistrate Judge Spero's Report is correct, well-reasoned, and thorough, and the Court
19 **ADOPTS** it in every respect. Magistrate Judge Spero granted Mr. Bush's application to proceed *in*
20 *forma pauperis* and subsequently reviewed the sufficiency of Mr. Bush's complaint pursuant to 28
21 U.S.C. § 1915(e)(2)(B). Courts must engage in screening and dismiss any claims which: (1) are
22 frivolous or malicious; (2) fail to state a claim on which relief may be granted; or (3) seek
23 monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2)(B); *see*
24 *Marks v. Solcum*, 98 F.3d 494, 495 (9th Cir. 1996).

25 The Court construes Mr. Bush's pleadings liberally, as he is proceeding *pro se*. *See*
26 *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) ("A document filed *pro se* is to be liberally
27 construed . . . and a *pro se* complaint, however inartfully pleaded, must be held to less stringent
28 standards than formal pleadings drafted by lawyers[.]" (internal quotation marks omitted)). The

1 standards for evaluating whether a complaint states a viable cause of action are well known and
2 not in dispute.

3 The Court agrees with Magistrate Judge Spero’s analysis that Mr. Bush’s APA claims are
4 insufficiently pled and can be dismissed as a matter of law. As analyzed by Magistrate Judge
5 Spero, the CDC’s order entitled “Requirement for Negative Pre-Departure COVID-19 Test Result
6 or Document of Recovery from COVID-19 for all Airline or Other Aircraft Passengers Arriving
7 into the United States from any Foreign Country” (the “Order”), which is published in the Federal
8 Register and became effective on January 26, 2021 (see FR 7387-7391), was lawfully issued
9 under Section 361 of the Public Health Act, codified at 42 U.S.C. § 264. In turn, the Order was
10 lawfully implemented pursuant 42 C.F.R. §§ 71.20 and 71.31(b) and is not inconsistent with 42
11 C.F.R. § 71.11 that provides a “[a] carrier at any foreign port clearing or departing for any U.S.
12 port shall not be required to obtain or deliver a bill of health.” Magistrate Judge Spero also found
13 no authority or support for Mr. Bush’s theories that the Order is arbitrary or capricious based upon
14 its application to the airline industry, its timing, and inconsistency with 42 C.F.R. § 71.11. There
15 is no reason to deviate from the correct, well-reasoned, and thorough Report.

16 The Court further agrees that the complaint fails to state a claim that the Order violates
17 Article I, Section 1 of the United States Constitution because the Order is authorized by Section
18 361 of the Public Service Health Act. *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 473-74
19 (2001).

20 Mr. Bush’s objection essentially reiterates implausible and conclusory assertions that were
21 already rejected by the Report in recommending dismissal of his claims. Indeed, Mr. Bush seems
22 to concede that “the Petitioner acknowledged the CDC Director may be within her authority to
23 conduct disease prevention methods at global Airports” and focuses on the “bills of health” that
24 Magistrate Judge Spero correctly held are inapplicable in the context of airline passengers. (Dkt.
25 No. 9 at 11; Report at 7-8.) Mr. Bush now argues that testing procedures do not comply with the
26 definition of “non-invasive” because the “Director has not provided US Public Health Service
27 employees or other agents that have been determined to have appropriate training in public health
28 as required.” (Dkt. No. 9 at 8.) However, the Order expressly provides that the document

1 demonstrating the “Qualified Test result” must verify “the laboratory or healthcare personnel who
2 performed the test.” Mr. Bush has not demonstrated how this is not “an authorized public health
3 worker . . . or another individual with suitable public health training” as defined in 42 C.F.R. §
4 71.1. Mr. Bush also argues that he “has not been able to confirm that the Director has obtained
5 approval from the Secretary” for implementation of the Order. This does not change the result.
6 Magistrate Judge Spero’s Report explains that the Secretary of Health and Human Services has
7 promulgated regulating provisions that implement Section 361 of the Public Health Service Act
8 and has delegated enforcement to the CDC. *See 42 C.F.R. pt. 70; Control of Communicable
9 Diseases, Apprehension and Detention of Persons With Specific Diseases, Transfer of
10 Regulations*, 65 Fed. Reg. 49,906, 49,907 (Aug. 16, 2000).

11 Finally, Mr. Bush raises a new theory that was not presented in his complaint.
12 Specifically, he contends that the Order is arbitrary because it is “in essence and effect, barring the
13 reentry of US Citizens and lawful residents by Airline Carriers from returning home to the United
14 States who are found to be infected with Covid 19 . . . in critical violation of 42 [C.F.R.] §
15 71.40(f).” However, Section 71.40 authorizes the Director to prohibit entry into the United States
16 of persons from designated foreign countries that are not U.S. citizens, U.S. nationals, or lawful
17 permanent residents. This provision does not bear on Section 71.20 which authorizes the Director
18 to “conduct public health prevention measures, at U.S. ports of entry or other locations, through
19 non-invasive procedures,” 42 C.F.R. § 71.20(a), which would apply irrespective of citizenship,
20 residency status, and the country of origin. The Order was also not implemented pursuant to and
21 in excess of Section 71.40(f).

22 Accordingly, and for the reasons set forth in the Report: this case is **DISMISSED WITH**
23 **PREJUDICE** for failure to state a claim. This Order terminates the case and Docket Number 6. The
24 Clerk of the Court is directed to close this case.

25 **IT IS SO ORDERED.**

26 Dated: October 25, 2021


27 YVONNE GONZALEZ ROGERS
28 UNITED STATES DISTRICT JUDGE